BAY-BOE

FILED
SEP 10 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1944.

No. 413

BAY STATE DREDGING & CONTRACTING COMPANY,

Petitioner,

versus

L. METCALFE WALLING, Administrator of the Wage and Hour Division, U. S. Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

EDWARD C. PARK,
Counsel for Petitioner.

Of Counsel:
HERMAN SNYDER,
SAMUEL L. BAILEN,
73 Tremont St., Boston, Mass.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

152183

SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Question Presented	
The question as to the proper construction of the term "seaman" as used in Section 13 (a) (3) of the Fair Labor Standards Act of 1938	2
Statement	3
Facts	4
Specifications of Errors to be Urged	8
Reasons Relied on for Allowance of the Writ	9
Brief in Support of the Petition for Writ of Certiorari.	11
POINT I—The Decision of the Circuit Court of Appeals as to the Interpretation of the Exemption Contained in Section 13 (a) (3) of the Fair Labor Standards Act of 1938 involves an Important Question of Federal Law Which Has Not Been But Should be Settled by this Court	11
(A) Petitioner's Employees on Board Dredges are Seamen and Have Always been Included Within the meaning of that term	16
(B) The Legislative history and background of Section 13 (a) (3) indicates that Congress intended dredge workers to be included within the exemption	20
(C) The term "Member of a Crew" and its light on the Congressional intent	25
(D) The Benefits enjoyed by Seamen explains the Congressional Intent	27
POINT II—Conflict of Jurisdiction	28

PAGE

POINT III—The Decision of the Circuit Court of Appeals holding that dredge employees are not seamen and therefore not within the exemption is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.. 31

Conclusions 35

CASES CITED.

Anderson v. Manhattan Lighterage Corp., 148 Fed. (2d) 971, (C. C. A. 2).....14, 15, 30, 36

Berwind-White Coal Mining Co. v. Rothensies, 137 Fed. (2d) 60 (C. C. A. 3)..... 26

Bolan v. Bay State Dredging & Contracting Co., 48 Fed. Sup. 266 (D. Mass.).....3, 14, 16, 30

Butler v. Ellis, 45 Fed. (2d) 951 (C. C. A. 4).....12, 23

Carumbo v. Cape Cod Steamship Co., 123 Fed. (2d) 991 (C. C. A. 1) 26, 30

City of Los Angeles v. United Dredging Co., 14 Fed. (2d) 364 (C. C. A. 9).....12, 23

Ellis v. United States, 206 U. S. 246..9, 12, 21, 31, 32, 33, 34

Gale v. Union Bag & Paper Corp., 116 Fed. (2d) 27, (C. C. A. 5) (cert. den. 313 U. S. 559) ..13, 14, 16, 28, 29, 30, 36

International Stevedoring Co. v. Havery, 272 U. S. 50 25

Kibadeaux v. Standard Dredging Co., 81 Fed. (2d), 670, (C. C. A. 5) (cert. den. 299 U. S. 549).....11, 27

Lowrimoore v. Union Bag & Paper Corp., 30 Fed. Sup. 647 (S. D. Ga.) 28

Maryland Casualty Co. v. Lawson, 94 Fed. (2d) 190 (C. C. A. 5) 12, 18

A. L. Mechling Barge Line *et al.* v. Bassett *et al.*, 119 Fed. (2d) 995 (C. C. A. 7)..... 19

McMaster v. One Dredge, 95 Fed. 832 (D. Oregon).... 23

PAGE

McRae v. Bowers Dredging Co., 86 Fed. 344 (D. Washington) 11, 18
Norton v. Warner Co., 321 U. S. 565..... 18, 19, 34, 35
Pariser v. City of New York, 146 Fed. (2d) 431, (C. C. A. 2) 12
Saylor v. Taylor, 77 Fed. 476 (C. C. A. 4)..... 11
The Alabama, 22 Fed. 449 (S. D., Ala.)..... 23, 24
The Atlantic, 53 Fed. 607 (D., South Carolina)..... 11
The Carson, 104 Fed. (2d) 762 (C. C. A. 9). (cert. den. *sub. nom.* Union Dredging Co. v. Brashear, admx., 308 U. S. 591) 12, 19, 27
The Hurricane, 2 Fed. (2d) 70, (E. D., Pa.)..... 11
The Ocean Spray, 4 Sawyer, 105 (D., Oregon)..... 18
The Pioneer, 30 Fed. 206 (E. D., N. Y.)..... 23
The Starbuck, 61 Fed. 502 (E. D., Pa.)..... 24
Walling, Adm. v. Great Lakes Dredge & Dock Co., 149 Fed. (2d) 9, (C. C. A. 7)..... 14, 15, 30, 31, 36
Walling, Adm. v. W. D. Haden Co., Case No. 11302, 5th Circuit Court of Appeals 15, 30
Warner v. Goltra, 293 U. S. 155..... 17

STATUTES CITED.

Act of June 5, 1920 (Merchant Marine Act), 41 Stat. 1007, 46 U. S. C. 688..... 17, 25
Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., 201..... 2, 34
Sec. 13 (a) (3)..... 2, 3, 8, 9, 11, 14, 16, 20, 31
Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C., sec. 901, 903, 44 Stat. 1424, 1426..... 25
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925 2
Social Security Act, 42 U. S. C., 1004, 1101 (b)..... 26
46 U. S. C. 1175-a..... 23
Act of March 3, 1913, ch. 106, 37 Stat. 726, 40 U. S. C. 321 34

IV.

Miscellaneous.

PAGE

Interpretative Bulletin No. 1, issued by Wage & Hour Division, U. S. Department of Labor..... 13

Interpretative Bulletin No. 11, issued by Wage & Hour Division, U. S. Department of Labor, July, 1939...13, 14

Joint hearings before Senate Commission on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Cong., 1st Sess., p. 549.. 21

81 Cong. Rec. 7792..... 21

7875..... 21

83 Cong. Rec. 7280..... 21

Report from Committee on Labor to accompany S. 2475, 75th Cong., 1st Sess., page 9..... 21

Report of U. S. Maritime Commission to Congress for year ended October 25, 1938, page 9..... 22

Wage & Hour Release R-899, issued by Wage & Hour Division, U. S. Department of Labor, July 12, 1940.. 13

Wage & Hour Release, R-1467, issued by Wage & Hour Division, U. S. Department of Labor, June 21, 1941.. 13

29 Op. A. G. 583..... 20

Supreme Court of the United States

October Term, 1944.

No. .....

BAY STATE DREDGING & CONTRACTING COMPANY,

Petitioner,

versus

L. METCALFE WALLING, Administrator of the Wage and Hour Division, U. S. Department of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Bay State Dredging & Contracting Company, a Massachusetts corporation, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit to review its order entered May 9, 1945 (R. pp. 23-35) which reversed the judgment of the United States District Court for the District of Massachusetts entered December 9, 1943, dismissing the Complaint of the Respondent, L. Metcalfe Walling, Administrator of the Wage and Hour Division, U. S. Department of Labor (R. pp. 18 and 19).

Opinion Below.

The opinion of the Court below appears on pages 23-24 of the Record and is reported in 149 F. (2d) 346.

Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, c. 229, sec. 1, (28 U. S. C. Section 347 (a), 43 Stat. 938). The date of the order by the Circuit Court of Appeals for the First Circuit to be reviewed is May 9, 1945. A petition for re-hearing was denied on July 30, 1945 (R. p. 35).

Statute Involved.

This case involves the question of the applicability of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201) to Petitioner's employees on board dredges. It is conceded that they are engaged in interstate commerce. The question is whether they are exempted by Section 13 (a) (3) which provides as follows:

> "The provisions of Sections 6 and 7 shall not apply with respect to . . .
>
> (3) Any employee employed as a seaman . . .".

Question Presented.

The question as to the proper construction of the term "seaman" as used in Section 13 (a) (3) of the Fair Labor Standards Act of 1938.

Whether the Court correctly construed the meaning of the exemption, by disregarding the established meaning of the word "seaman" as including dredge workers, giving,

instead, its own interpretation to language used by Congress, which was not ambiguous or doubtful in meaning at the time of the enactment of the legislation.

Statement.

This suit by the Administrator seeks to enjoin the Petitioner from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938. No evidence was offered in support of the alleged violation of Section 15 (a) (5) of the Act relating to record keeping. Accordingly, the case, as presented to the District Court and to the Circuit Court of Appeals, sought to enjoin the Petitioner from a violation of Section 15 (a) (2) of the Act. That section prohibits the violation of Section 6 fixing minimum wages and Section 7 establishing maximum hours.

The case was submitted to the District Court on an Agreed Statement of Facts (R. pp. 8-17). On December 9, 1943, the District Court denied the Respondent's prayer for an injunction and ordered the action dismissed (R. p. 18). The Court founded its decision entirely upon the law and reasoning of the case of *Bolan v. Bay State Dredging & Contracting Co.*, 48 Fed. Sup. 266 (D. Mass.). Based upon the law and reasoning of that case, the District Court held the Petitioner's employees to be seamen within the meaning of the exemption contained in Section 13 (a) (3) of the Fair Labor Standards Act of 1938 (R. pp. 18-19).

The Circuit Court of Appeals, failing to follow the line of judicial interpretations of the term "seaman" and the well settled meaning of the word as applied to dredge employees, reversed the District Court and remanded the case for further proceedings. The Petitioner's Petition for Rehearing was denied on July 30, 1945 (R. p. 35).

Facts.

The facts were stipulated by agreement of the parties (R. pp. 8-17), and were found by the District Court as stipulated (R. p. 19). They may be summarized as follows:

Petitioner is engaged in the business of dredging navigable rivers and harbors, and the performance of general marine work in the improvement of navigable rivers and harbors for interstate commerce (R. p. 8).

In the performance of its activities, the Petitioner operates six dredges, two of which are clamshell dredges with a five cubic yard bucket; one is a clamshell dredge with a two cubic yard bucket; two are dipper dredges, and the sixth is a hydraulic dredge rented by the Petitioner from an affiliate company (R. p. 9).

In addition, the Petitioner operates thirty-five mud scows, varying in capacity from one hundred to six hundred cubic yards, and seven sea-going tow boats which are used in connection with dredging operations (R. p. 9).

The dredges are equipped in the same manner as an ordinary maritime vessel. Generally, they have two decks, a galley, mess hall, state room and bunks. They are equipped with bilge pumps, fire pumps and circulating pumps, together with Kapok life preserving jackets which are supplied to every man. They have a yawl boat which is used for general utility purposes and as a life boat (R. p. 10). The dredges are not usually self-propelled, being moved from place to place by a tow boat. As the work progresses, the dredge can be moved by swinging the bucket under water. Such a movement is only, normally, at the rate of ten or fif-

teen feet at a time, although, in an emergency, a dredge can proceed for a distance of several miles by this method (R. p. 10). The dredge is held in place by means of spuds fore and aft on the dredge which rest on the bottom. The spuds are raised and lowered as the water level rises and falls (R. p. 10).

The hydraulic dredge operates differently from the dipper or clamshell dredge in that the mud is not deposited in scows for transportation to a dumping ground but is sucked up by centrifugal pumps and transported through a pipe line directly to the place of deposit. The hydraulic dredge is able to propel itself forward at a rate of four miles per hour by use of its centrifugal pumps. It can not steer itself but must be guided by a tow boat. It is, therefore, towed when moving from one place to another (R. p. 11).

The average complement of the dredge consists of a captain, one operator, a mate, four deckhands, an oiler, a fireman, a cook, mess boy and watchman (R. p. 11). The captains and operators have separate staterooms of their own. For the remainder of the men there are rooms, most of which accommodate two and some of which accommodate four persons. These rooms contain lockers or closets for the men's wardrobe (R. p. 11). All meals are served on board the dredge, a cook and mess boy being provided for that purpose. No charge is made to the men for their living quarters. They are charged thirty-five cents per meal for their food which represents a loss to the company (R. p. 11).

Most of the employees come from Boston and, when a job is being carried on away from Boston, practically the

entire personnel live on board. When a job is being carried on very close to Boston, many of the employees continue to live on board the dredge, while many of them go ashore by launch to living quarters in and around Boston. Practically all the employees take some of their meals on board the dredge, even though the job is close to Boston. Some of the men live on board the dredge at all times while working for the company (R. pp. 11 & 12).

The duties of the men may be described as follows:

The *captain* must have a knowledge of tidal and weather conditions and customarily has some knowledge of navigation (R. pp. 12, 13 and 14).

The *operator* or runner is virtually the captain's assistant when the dredge is in tow. He takes care of whistles by which the dredge communicates with the tow boat. The whistle signals are similar to those used on steamers generally. He watches out for passing vessels and sometimes communicates with passing vessels in order to avoid collisions or other difficulties that may arise. When dredging operations commence, the operator or runner puts the dredge in position and then moves it ahead or backwards as required. He lines her up on the ranges for the dredging work, operates the lever, and runs the dredge machinery. During dredging operations he continues to operate the whistle in order to signal other craft, to summon tugs, scows, the service launch, and, if necessary to warn passing vessels. He alone operates the throttle in the pilot house controlling the deck engines which move the scows alongside the dredge (R. pp. 12-13-14).

The *mate* takes care of running lights which are used to warn or signal other craft, supervises the handling of tow

lines and sometimes takes care of the whistles. He is in charge of deckhands and loading of scows (R. pp. 13 and 14).

The *deckhands* are generally engaged in chipping, painting and cleaning the dredge while in tow. Under the supervision of the mate, they handle the lines which hold the scows in place when dredging operations are going on. They move the scow, as needed, by means of the lines, wind the scow up and get it ready for loading. They handle the spuds under the direct supervision of the mate, raising or lowering them as required for the movement of the dredge. They operate the deck engine, scrub decks, oil equipment, assist the firemen in tending the boilers, do repair work, and shovel coal (R. pp. 13-14-15).

The *scowmen* perform their duties partly on the scow and partly on the dredge. On the scow, they watch the tow lines as the scow is being towed to the dumping ground; signal the towboat in the event of trouble in the tow; open and clear the pockets of the scow, and clean its decks. When the scow is being loaded they assist in hoisting the spuds, cleaning decks, tending lines from the dredge, and in operating deck engines. Their duties on the dredge consume about half their time and are under the supervision of the mate (R. p. 15).

The *oilers*, or engineers, man the bilge, fire and circulating pumps. The bilge pumps are for the purpose of eliminating water in the hull of the dredge which would otherwise cause the dredge to sink. The fire pumps are for the purpose of supplying water necessary to put out fires. The circulating pumps are for the purpose of circulating water through the boilers. During dredging operations, they also oil the main engines, spud engines, deck engines

and swinging engines which are then in operation (R. pp. 13 and 15).

The *firemen* tend the boilers and keep up a head of steam so that bilge, fire and circulating pumps may be operated while the dredge is in tow. While dredging operations are going on, a greater head of steam must be maintained than when the dredge is in tow (R. pp. 13 and 15).

The *cook and mess boy* have the usual duties of such employees (R. p. 13).

The dredge employees of the Petitioner have never been organized by the National Maritime Union although in 1936 and in 1937, at the time of the Committee hearings on the Fair Labor Standards Act, they were eligible for membership in that Union (R. pp. 15-16).

The dredges of the Petitioner are inspected by the Division of Public Safety of the Commonwealth of Massachusetts and the license required of dredge employees is issued by that Division (R. p. 16).

The Federal law requires inspection only of vessels powered by steam, seagoing vessels powered by internal combustion engines, and motor vessels of more than fifteen gross tons carrying passengers or freight for hire but not engaged in fishing as a regular business. A self-propelled dredge would be subject to such inspection (R. p. 17).

Specifications of Errors to be Urged.

The Circuit Court of Appeals erred in holding that employees on board dredges were not seamen within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act of 1938.

The Circuit Court concluded that the term "seaman" has no established meaning to include dredge workers and that to include such workers within the meaning of the exemption would enlarge the scope of the term beyond its usual boundaries.

The Petitioner will urge that this conclusion is directly opposed to the judicial and legislative history of the term. At the time of the enactment of the Fair Labor Standards Act, the word "seaman" had an established meaning as including dredge workers by virtue of every judicial precedent then existing. The legislative history of the Fair Labor Standards Act evidenced no intention on the part of Congress to restrict or narrow the term so as to possess a more limited meaning than had theretofore been ascribed to it.

The subsidiary conclusion of the Circuit Court of Appeals that only water transportation workers were intended by Congress and that this automatically excluded dredge workers is unsound. It cannot be demonstrated from the legislative history that only water transportation workers as such were intended, but, if this be the case, employees on board dredges are nevertheless within the meaning of the exemption since they are water transportation workers.

The Circuit Court of Appeals further erred in its analysis of the case of *Ellis vs. United States*, 206 U. S. 246, and its failure to follow the reasoning of that case together with apposite Circuit Court cases.

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals as to the exemption contained in Section 13 (a) (3) of the Fair

Labor Standards Act, by holding workers on board dredges to be outside that exemption, involves an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals, in holding Petitioner's dredge workers to be non-exempt, has applied a rule of law in conflict with prior interpretation of the statute by the Fifth Circuit.

3. The decision of the Circuit Court of Appeals that employees on board dredges are not seamen is a decision of a federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit, at Boston, Massachusetts, requiring said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this action, to the end that this action may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

BAY STATE DREDGING & CONTRACTING COMPANY,
By EDWARD C. PARK,
Counsel for Petitioner.

Of Counsel:
HERMAN SNYDER,
SAMUEL L. BAILEN,

BOSTON, MASSACHUSETTS
September 6, 1945.